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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FERA APPEAL NO.46 OF 2007

WITH

CIVIL APPLICATION NO.4143 OF 2007

Sunil M. Shah)
Sahavas Building, 14/3,)
Andheri Co-operative Housing)
Society, Andheri (W), Mumbai-58)...APPELLANT

Vs.

1.The Appellate Tribunal for)
Foreign Exchange, Janpath Bhavan)
Janpath, New Delhi-110 001.)
2.The Special Director of)
Enforcement, Janmabhoomi Chambers)
Walchand Hirachand Marg,)
Mumbai-400 001.)
3.Union of India through Ministry)
of law (Legal and Judicial))
Ayakar Bhavan, Marine Line,)
Mumbai-400 020.)..RESPONDENTS

Ms. Mallika Ingale i/b. Tushar V.Shah for the Appellant.
Mr. R.V. Desai, Senior Counsel with Mrs. S.V. Bharucha, Mr. Y.R. Mishra and Mr. Y.S. Bhate for the Respondents.

CORAM: F.I. REBELLO & J.P. DEVADHAR, JJ.
DATE : 5TH OCTOBER, 2007.

ORAL JUDGMENT (PER F.I. REBELLO,J.)

. The Appellant had preferred an Appeal before the Appellate Tribunal for Foreign Exchange. The Tribunal had earlier passed an order on 9th March, 2006 ordering deposit of Rs.70.00 lakhs. The Tribunal, it appears, thereafter reconsidered the matter and by its order dated 9th February, 2007

reduced the amount of pre-deposit to 20% of the penalty within 30 days from the receipt of the order failing which their Appeal will be dismissed on that alone. The Appellant did not deposit the said amount and consequently by order dated 29th May, 2007 the Appeal was dismissed for failure to pre-deposit the amount as directed.

2. When the Appeal came up for hearing we asked the learned Counsel as to how the Appeal was maintainable. The learned Counsel contends that the Appeal is maintainable in terms of Section 54 of the Foreign Exchange Regulation Act, 1973, hereinafter referred to as the Act. Learned Counsel also relied on the judgment of the learned Division Bench of the Karnataka High Court in the case of Mrs. Sudershan Boury and Anr. vs. Director of Enforcement, New Delhi.

3. We have considered the provisions and the scheme for preferring an Appeal. Section 52 is the power conferred for preferring an Appeal to the Appellate Board. Section 52(2) reads as under:-

> 52. Appeal to Appellate Board.__ (2) Any person aggrieved by such order may, on payment of such fee as may be prescribed and, after depositing the sum imposed by way

> of penalty under Section 50 and within forty-five days from the date on which the order is served on the person committing the contravention, prefer an appeal to the Appellate Board:
>
> Provided that the Appellate Board may entertain any appeal after the expiry of the said period of forty-five days, but not after ninety days, from the date aforesaid if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time:
>
> Provided further that where the Appellate Board is of opinion that the deposit to be made will cause undue hardship to the appellant, it may, in its own discretion, dispense with such a deposit either unconditionally or subject to such conditions as it may deem fit."

It is thus clear that an Appeal to be properly constituted or maintained, there has to be a compliance with the requirement of Section 52(2) of the Act, which is by depositing the sum imposed by way of penalty unless or an order for dispensing with pre-deposit or such amount as directed by the

Appellate Board is deposited.

. Section 54 reads as under:-

"54. Appeal to High Court.- An appeal shall lie to the High Court only on questions of law from any decision or order of the Appellate Board under sub-section (3) or sub-section (4) of Section 52:

Provided that the High Court shall not entertain any appeal under this section if it is filed after the expiry of sixty days of the date of communication of the decision or order of the Appellate Board, unless the High Court is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

Explanation-- In this Section and in Section 55, "High Court" means --

(i) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and

(ii) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents ordinarily resides or carries on business or personally works for gain."

4. The mandate of the Section, therefore, is that an Appeal would lie only in respect of the orders passed under sub-sections (3) and (4) of Section 52. In order to pass an order under sub-sections (3) and (4) there has to be first a properly constituted appeal before the Appellate Board. If there is no properly constituted Appeal the question of the Tribunal addressing itself to the legality of the order for the purpose of confirming, modifying or setting aside the order under sub-sections (3) and (4) would not arise. In the instant case, therefore, the Appeal as filed was not properly constituted on failure by the Appellant to comply with the order of predeposit as envisaged under Section 52(2) of the Act and was not maintainable. Section 54 does not provide for any Appeal against an order passed under Section 52(2) of the Act.

4. Before us what the Appellant is seeking to

challenge is the exercise of the discretion by the Appellate Board in exercise of the powers under Section 52(2). That is not an appealable order under Section 54. Whatever remedy that the Appellant may have, no Appeal can lie against that order under Section 54. The Appeal therefore, as filed would not be properly constituted and would not be maintainable.

5. We have considered the judgment of the learned Division Bench of the Karnataka High Court relied upon by learned Counsel. Firstly, the issue which has arisen here was not in issue therein. The question of law was in respect of the question of penalty and the exercise of discretion. In other words in a properly constituted appeal, whether there was power in the Appellate Court to consider the issue of discretion exercised by the Tribunal in the matter of penalty.

6. We make it clear that if the Appellant has any other remedy at law it will be open to him to pursue such remedy. As the Appeal is dismissed, Civil Application has become infructuous. Civil Application dismissed as infructuous.

(J.P. DEVADHAR, J.) **(F.I. REBELLO,J.)**